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IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

MATIMAK TRADING COMPANY LIMITED,
Petitioner,
v.
ALBERT KHALILY, d/b/a UNITEX MILLS, INC., and D.A.Y. KIDS SPORTSWEAR, INC.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF OF THE GOVERNMENT OF THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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Having obtained the written consent of the parties pursuant to Rule 37.2 of the Rules of this Court, the Government of the United Kingdom of Great Britain and Northern Ireland ("British Government") submits this brief as *amicus curiae* in support of the petition for a writ of certiorari filed on behalf of Matimak Trading Company Limited ("Matimak").[1]

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[1] The consents are filed contemporaneously with this brief. Pursuant to Rule 37.6 of this Court, counsel for the British Government state that they have authored this *amicus curiae* brief in whole and that only the British Government has made or will make a monetary contribution to the preparation and submission of this brief.

INTEREST OF THE GOVERNMENT OF THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND

In 1978, the Department of State, at the suggestion of the Clerk of this Court,[2] encouraged foreign governments to present their views directly to U.S. courts.[3] Since then, friendly foreign governments have relied on the State Department's position and have presented their views directly to this and other U.S. courts.

The British Government has a substantial interest in expressing to the Court its views with respect to this proceeding. The petitioner is a corporation organized under the laws of Hong Kong and has its principal place of business there. At the time pertinent to the jurisdictional issue raised by the petition, Hong Kong was a British Dependent Territory. The question presented by the petition—whether a corporation formed under Hong Kong law was at that time a "citizen or subject" of a "foreign state" for purposes of Article III of the United States Constitution and 28 U.S.C. § 1332(a)(2)—therefore turns in large part on the relationship that then existed between the United Kingdom and Hong Kong corporations. Indeed, the decision below by the United States Court of Appeals for the Second Circuit directly addresses issues of British law, including the interpretation of the British Nationality Act of 1981. *Matimak Trading Co. v. Khalily*, 118 F.3d 76, 85-86 (2d Cir. 1997).

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[2] Letter from Solicitor General McCree to Legal Adviser Hansell (May 2, 1978), *printed in* Dep't of State, 1978 *Digest of United States Practice in International Law* 560, *reprinted in part in* 73 Am. J. Int'l L. 122, 125 (1979).

[3] Dep't State Circular Diplomatic Note to Chiefs of Mission in Washington, D.C. (Aug. 17, 1978), *reprinted in* Dep't of State, 1978 *Digest of United States Practice in International Law* 560, *reprinted in part in* 73 Am. J. Int'l L. 122, 124 (1979). *See also* Letter from Deputy Legal Adviser Marks (June 15, 1979), *described in* 73 Am. J. Int'l L. 669, 678-79 (1979).

Although British sovereignty over Hong Kong ended on July 1, 1997, when Hong Kong became a special administrative region of the People's Republic of China, the question of whether corporations organized under the laws of the British Dependent Territories may have access to the U.S. federal courts pursuant to alienage jurisdiction remains an important one for the British Government. There are thousands of corporations organized under the laws of those territories which would be denied access to the U.S. federal courts under the view of the alienage jurisdiction adopted by the court below. The United States and the United Kingdom are major trading partners of one another and have a close working relationship on both commercial and foreign policy matters. The British Government submits that it would not be in the interest of that relationship for the corporations of the British Dependent Territories to be excluded from the United States federal courts. It therefore appreciates the Court's consideration of this brief urging review on writ of certiorari.

STATEMENT OF THE CASE

The complete background of this proceeding has been briefed in the petition for a writ of certiorari ("Petition") filed on behalf of Matimak. The case involves a suit for breach of contract brought by Matimak, a Hong Kong corporation, against two New York corporations in the Southern District of New York. The district court dismissed the action for lack of subject matter jurisdiction on the ground that Hong Kong is not a foreign state and that hence corporations organized under its laws are not deemed subjects of a foreign state for purposes of the alienage jurisdiction of 28 U.S.C. § 1332(a)(2).[4] The Court of Appeals for the Second Circuit affirmed by a 2-1 vote. It reasoned that (1) because it was under British sovereignty as a dependent territory, Hong Kong was not

[4] *See* 936 F. Supp. 151 (S.D.N.Y. 1996), Petition Appendices B-D.

a "foreign state" under § 1332(a)(2), and (2) as an entity incorporated under Hong Kong law, Matimak's connection with the British Crown was "too attenuated." Accordingly,

> . . . Matimak is not a "citizen or subject" of a foreign state. It is thus stateless. And a stateless person—the proverbial man without a country—cannot sue a United States citizen under alienage jurisdiction.

118 F.3d 76, 86 (2nd Cir. 1997), Petition Appendix A at 20a.

Judge Altimari dissented. He reasoned that a "stateless corporation is an oxymoron" because a corporation can only be created with the imprimatur of a state. 118 F.3d at 89 (Petition Appendix A at 28a). He concluded that the alienage jurisdiction should properly be construed in such a way as to allow a Hong Kong corporation to litigate its claims in the U.S. federal courts. *Id.* at 92 (Petition Appendix at 34a). Matimak's petition for rehearing and suggestion for rehearing *en banc* were denied. Petition Appendix E.

SUMMARY OF ARGUMENT

At the time pertinent to this case, when Matimak, a Hong Kong corporation, brought suit in U.S. federal court against two New York corporations, Hong Kong was a Dependent Territory of the United Kingdom. Accordingly, the companies incorporated under Hong Kong law operated under the sovereignty of the United Kingdom. They should have been regarded as British companies, and not as stateless entities as was held by the majority of the court below. The United Kingdom's sovereignty over its Dependent Territories (which until June 30, 1997 included Hong Kong) as a matter of international law, together with the strong constitutional relationship between the United Kingdom and its Dependent Territories, lead to the conclusion that the corporations of those territories should be regarded as "subjects" of the United

Kingdom for purposes of U.S. alienage jurisdiction. The decision of the court below, if left standing, will unfairly deny access to the neutral forum provided by the U.S. federal courts to thousands of corporations organized in the remaining British Dependent Territories. As a matter of international comity and reciprocity, the United States should afford to corporations organized under the laws of the British Dependent Territories the same access to its courts as is provided by the British courts to corporations established in the U.S. territories.

ARGUMENT

I. INTRODUCTION

This case raises important questions concerning whether the availability and protection of the U.S. federal courts will be denied to the numerous corporations organized under the laws of the British Dependent Territories, which are territories under the sovereignty of the United Kingdom and whose laws are derived from United Kingdom legislation. The court below, by a 2-1 vote, has denied this access through applying a needlessly narrow and technical interpretation of the United States Code. The British Government urges this Court to grant certiorari and to reverse this decision in the interests of international comity.

II. THE UNITED KINGDOM HAS SOVEREIGNTY IN INTERNATIONAL LAW OVER ITS DEPENDENT TERRITORIES, AND THIS IS EXERCISED THROUGH THE CLOSE CONSTITUTIONAL RELATIONSHIP WHICH EXISTS BETWEEN THE UNITED KINGDOM AND THOSE TERRITORIES

The Dependent Territories of the United Kingdom are territories over which the United Kingdom has sovereignty in international law. This sovereignty is exercised through the close constitutional relationship which exists between the United Kingdom and its Dependent Territories. Until

July 1, 1997, Hong Kong was such a Dependent Territory.[5] The Constitutions of the Dependent Territories are set out in United Kingdom legislation. The Constitutions of the Dependent Territories contain, among other matters, provision with regard to the office of the Governor, the Executive Council and the Legislature. The legislation commonly takes the form of an Order in Council made under the authority of a United Kingdom statute or under the Royal Prerogative. In the case of Hong Kong, the legislative basis for the Constitution was letters patent made under the Royal Prerogative.

Under the Constitutions of the Dependent Territories (including, formerly, that of Hong Kong), the Governor of the territory is appointed by The Queen. The Governor has such powers as are conferred by the Constitution, as well as such other powers as The Queen may, from time to time, assign to him or her. The Governor must carry out his or her duties in accordance with such instructions, if any, as Her Majesty may, from time to time, see fit to give him or her. In practice, instructions are given to the Governor through the Secretary of State for Foreign & Commonwealth Affairs. In general, the Governor must exercise his or her functions in accordance with the advice of the Executive Council but remains responsible in his or her discretion for defense, external affairs, internal security, the police and certain matters relating to the public service.

The Governor may make laws with the advice and consent of the local Legislature and no Bill can become

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[5] At present, the Dependent Territories comprise the following territories: Anguilla, Bermuda, British Antarctic Territory, British Indian Ocean Territory, The British Virgin Islands, The Cayman Islands, The Sovereign Base Areas in Cyprus, The Falkland Islands, Gibraltar, Montserrat, Pitcairn, St. Helena and dependencies, South Georgia and South Sandwich Islands, and the Turks and Caicos Islands. The Channel Islands and the Isle of Man are also territories over which the United Kingdom has sovereignty. They are termed "Crown dependencies" and have a broadly similar constitutional relationship with the United Kingdom.

law until the Governor has assented to it on behalf of The Queen. Moreover, any law to which the Governor has given his or her assent may be disallowed by Her Majesty through a Secretary of State of the United Kingdom Government. In addition, power is reserved by The Queen to make laws for the territory with the advice of Her Privy Council for the peace, order and good government of the territory.[6] Ultimate legislative authority over the Dependent Territories is vested in the United Kingdom Parliament.

All laws of the Dependent Territory, including those relating to the incorporation of companies, are made under and have effect by virtue of the foregoing provisions.

III. CORPORATIONS OF THE BRITISH DEPENDENT TERRITORIES SHOULD BE CONSIDERED "SUBJECTS" OF THE UNITED KINGDOM FOR PURPOSES OF THE ALIENAGE JURISDICTION OF 28 U.S.C. § 1332

The British Dependent Territories are at all times under the sovereignty of the United Kingdom, and there is a distinct and strong constitutional relationship between the territories and the United Kingdom itself. They should therefore be regarded for the purposes of the U.S. alienage jurisdiction as part of a foreign State (the United Kingdom). The British Government submits that, in the last analysis, as the Brief For The United States As Amicus Curiae in the court below correctly pointed out with respect to Hong Kong, the corporations of the British Dependent Territories are "subjects" of United Kingdom sovereignty.[7] The majority in the court below acknowl-

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[6] In the case of Bermuda, the power of disallowance is more limited, and there is no power reserved to The Queen to legislate for peace, order, and good government.

[7] Brief For The United States As Amicus Curiae, filed in the court below in November 1996 at 6-7.

edged that a foreign state is entitled to define who are its citizens or subjects. 118 F.3d at 85. Nonetheless, its analysis of the relation between the United Kingdom and the corporations organized under the laws of the British Dependent Territories was not sound. As the majority opinion noted,[8] the corporations in the British Dependent Territories are not considered to be British "citizens" under British law. However, in their capacity as juridical persons, they must be considered "subjects" of the United Kingdom.

It appears to the British Government to be illogical and unfair to deem corporations organized under the laws of the Dependent Territories to be "stateless," as the court below has done, and hence as excluded from the benefits of the alienage jurisdiction of the U.S. federal courts. In contrast, the United States Court of Appeals for the Seventh Circuit was correct, in *Wilson v. Humphreys (Cayman) Ltd.*, 916 F.2d 1239, 1243 (7th Cir. 1990), when it characterized such an approach as allowing form to prevail over substance. Indeed, that court further observed:

> Certainly, the exercise of American judicial authority over the citizens of a British Dependent Territory implicates this country's relationship with the United Kingdom—precisely the raison d'etre for applying alienage jurisdiction.

Id.

Well-established principles of international law provide that every corporation is a national of the state under the laws of which it was created. *Restatement (Third) of the Foreign Relations Law of the United States* § 213 and comment c (1987). Organized under the laws of a Dependent Territory of the United Kingdom, Matimak should have been viewed as a British company and not as stateless. The concept of "statelessness" applied by the court

[8] 118 F.3d at 85-86.

below traditionally has been used in the context of individuals (*e.g.*, loss of citizenship, refugees) or ships on the high seas not clearly under the flag of a distinct sovereign. It makes no sense to apply that concept in a manner contrary to the law of nations in a situation of this international importance.

Under United Kingdom law, the nationality of a company depends on its place of incorporation. From this, it should follow that companies incorporated in the Dependent Territories under the sovereignty of the United Kingdom are regarded as British companies, rather than as stateless entities. While the British Government is not an authority on whether such companies are "subjects" or "citizens" of a foreign state as a matter of U.S. law, it believes it to be fair and appropriate that they should be considered "subjects," if not "citizens," of the United Kingdom for purposes of the alienage jurisdiction.

In addition to disagreeing with the conclusion of the court below on this point, the British Government respectfully takes issue with several of the findings and assumptions of that court which apparently formed the basis for its holding. The court majority opined that "there is no danger of foreign entanglements [here], as there is no sovereign with whom the United States could become entangled." 118 F.3d at 87. That this assumption was incorrect is evidenced by this brief *amicus curiae*. Moreover, the court majority expressed the view that "[i]f a foreign state has determined that a person is not entitled to citizenship it should certainly be unconcerned with that person's treatment in a court in the United States." *Id.* On the contrary, the fact that Hong Kong citizens or corporations did not enjoy precisely the same rights as citizens of the United Kingdom should not be dispositive. The United Kingdom is keenly concerned that the citizens and corporations of its Dependent Territories be able to bring and defend suits in neutral foreign fora concerning their global commerce.

The corporations of the territories of the United States presumably have some formal attributes by reason of their links with those territories that may differentiate them from the corporations of the U.S. states themselves. British courts do not focus on these distinctions. Any corporation which is validly incorporated under the laws in force in the place of its incorporation has the capacity to sue and be sued in the British courts. See, *e.g.*, 2 Albert Venn Dicey & John Humphrey Morris, *Conflict of Laws* 1107 (12th ed. 1993). As a matter of international comity and reciprocity, the United States should afford to corporations organized under the laws of the British Dependent Territories the same access to its courts as is provided by the British courts to corporations established in the U.S. territories.

IV. THE ASSURED NEUTRAL FORUM AFFORDED BY THE U.S. FEDERAL COURTS IS IMPORTANT TO THE CORPORATIONS ORGANIZED UNDER THE LAWS OF THE BRITISH DEPENDENT TERRITORIES

Although on July 1, 1997 Hong Kong ceased to be a territory under the sovereignty of the United Kingdom, the decision of the court below to the effect that Hong Kong corporations could not be considered "subjects of a foreign state" will, if left standing, have serious repercussions for the interests of other United Kingdom Dependent Territories in that companies incorporated in those territories will be denied the right of access to U.S. federal courts. The impact will be most severe on the Caribbean Dependent Territories and Bermuda, where substantial business is conducted with the United States by companies incorporated in those territories. To give an example, as of May this year there were 563 banks incorporated in the Cayman Islands, 377 insurance companies and 33,792 business companies. There were 1,400 insurance companies incorporated in Bermuda and 6,824 business companies. In the British Virgin Islands there were 130,000

business companies incorporated and in the Turks and Caicos Islands 1,911 insurance companies and 11,000 business companies.

As the British Government understands it, the alienage jurisdiction reflected in 28 U.S.C. § 1332(a)(2) was adopted to ensure that the "citizens" and "subjects" of foreign states had access to a neutral forum if they became embroiled in litigation in the United States with U.S. citizens. The federal courts are intended to provide this neutral forum. The denial of access to the federal courts declared by the court below would mean not only that the affected corporations could not initiate litigation in the federal courts, as in the present case, but also that as defendants in U.S. state court actions, they could not avail themselves of the federal court removal jurisdiction under 28 U.S.C. § 1441(a). "Because litigation in any state court would create a danger of prejudice to a citizen of a foreign country, there is considerable justification for making a federal tribunal available in all cases cognizable under the Constitution in which an alien is a party." 13b Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure: Jurisdiction 2d* § 3604 at 383 (1984).

The concern over providing a neutral forum historically focused on foreign individuals, but the rationale is equally appropriate today for the protection of foreign corporations. *See, e.g.*, Kevin R. Johnson, *Why Alienage Jurisdiction? Historical Foundations and Modern Justifications For Federal Jurisdiction Over Disputes Involving Noncitizens*, 21 Yale J. Int'l L. 1, 48 (1996) ("The economic justifications for alienage jurisdiction in some ways are currently stronger than at the time of the Constitutional Convention. The increasingly global economy has resulted in a vast growth of foreign trade by domestic business.") Of course, in the modern era of extended corporate international activity, the hub of transnational commercial matters is more frequently the corporation than the individual.

In sum, in the view of the British Government, it is important that the decision of the court below not be allowed to stand as a precedent. Because the principle of sensitivity to international comity that led to the adoption of the alienage jurisdiction remains fully appropriate today, the doors of the U.S. federal courts should not be narrowed.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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